Sanmugam Ponmugam Ponnan v Halijah bt Abbas & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S-23–78 OF 2010
ROSILAH YOP JC
28 MARCH 2013

Tort — Damages — Defamation — Letter of complaint to Advocates & Solicitors Disciplinary Board Kuala Lumpur — Whether letter of complaint defamatory — Elements of defamation — Whether proven — Whether defences of qualified privilege and absolute privilege could be invoked — Whether there was malice in publishing letter of complaint

In the present claim, the plaintiff, an advocate and solicitor sought for, inter alia, damages against the defendants for allegedly defaming him through a letter dated 3 February 2006 ('the complaint letter') which was signed by the first defendant, the Director General of Insolvency attached to the Insolvency Department Malaysia, and addressed to the Advocates & Solicitors Disciplinary Board, Kuala Lumpur ('board'). The second defendant named in this claim was a senior federal counsel at the same department as the first defendant. In the complaint letter, the plaintiff alleged that the natural and ordinary meaning words meant and were understood to mean that the plaintiff was a liar; a dishonest and untrustworthy person; and that he had intentionally deceived the Court of Appeal and was hence unfit to practice as an advocate and solicitor. It was alleged that the complaint letter was laced with malice, causing the plaintiff's reputation to be seriously injured. The plaintiff claimed that this caused him distress and embarrassment. In their defence, the defendants contended that the content of the said letter was published in a state of qualified privilege and there was no malice on the defendants in publishing the said complaint letter. According to the first defendant, she did investigate as to what had transpired during the appellate court proceeding that resulted the comments made by the Court of Appeal judge and was published in several newspapers. Later, the complaint letter was written to the board by the first defendant for the content of the said letter to be investigated. Further, the defendants pleaded the defence of absolute privilege.

Held, dismissing the claim with costs of RM20,000:

(1) Based on the principles of law, the content of the said letter was made in the state of qualified privilege. On the point of reciprocity required on the part of the receiver of the complaints, the board was not only a body with a corresponding interest but it was also under a legal obligation as mandated by the law. The defendants having shown that they had legal

rights to complain, and the board, quite clearly having a legal duty to receive the complaints, the defence of qualified privilege was available to the defendants (see paras 23, 24 & 33).

(2) Based on the evidence, the plaintiff failed to prove that there was malice on the publication of the complaint letter by the first defendant. Although the defendants had pleaded the defence of absolute privilege, the court found that the defendants had successfully proved their defence of qualified privilege, thus it was sufficient for the court to justify and determine a defence where the defendant had successfully proven it. Defence of qualified privilege is one of the defences for defamation cases other than absolute privilege (see paras 36–37).

[Bahasa Malaysia summary

Dalam tuntutan ini, plaintif, peguambela dan peguamcara memohon untuk, antara lain, ganti rugi terhadap defendan-defendan kerana didakwa memfitnah dia melalui surat bertarikh 3 Februari 2006 ('surat aduan') yang ditandatangani oleh defendan pertama, Ketua Pengarah Insolvensi yang ditempatkan di Jabatan Insolvensi Malaysia, dan dialamatkan kepada Lembaga Disiplin Peguambela & Peguamcara, Kuala Lumpur ('lembaga'). Defendan kedua yang dinamakan di dalam tuntutan ini adalah peguam kanan persekutuan di jabatan yang sama seperti defendan pertama. Dalam surat aduan, plaintif mendakwa bahawa maksud perkataan biasa bermaksud dan difahami sebagai bermaksud bahawa plaintif adalah pembohong; seorang yang tidak jujur dan tidak boleh dipercayai; dan bahawa dia berniat untuk menipu Mahkamah Rayuan dan maka tidak layak untuk mengamalkan undang-undang sebagai peguambela dan peguamcara. Ia didakwa bahawa surat aduan tersebut dicalitkan dengan niat jahat, menyebabkan reputasi plaintif dicemar. Plaintif mendakwa bahawa ini menyebabkan dia menderita dan malu. Defendan-defendan di dalam pembelaan mereka berhujah bahawa isi kandungan surat tersebut diterbitkan dalam keadaan perlindungan bersyarat dan dia niat jahat oleh pihak defendan-defendan dalam menerbitkan surat aduan tersebut. Mengikut defendan pertama, dia telah menyiasat tentang apa yang berlaku semasa prosiding mahkamah rayuan yang mengakibatkan komen-komen yang dibuat oleh hakim Mahkamah Rayuan dan diterbitkan di dalam beberapa surat khabar. Kemudiannya surat aduan ditulis kepada lembaga oleh defendan pertama untuk isi kandungan surat tersebut disiasat. Selanjutnya, defendan-defendan memplid pembelaan perlindungan mutlak.

Diputuskan, menolak tuntutan dengan kos RM20,000:

(1) Berdasarkan prinsip undang-undang, isi kandungan surat tersebut dibuat dalam keadaan perlindungan bersyarat. Atas perkara kesalingan yang dikehendaki bagi pihak penerima aduan-aduan, lembaga bukan saja badan yang mempunyai kepentingan yang sama tetapi ia juga di bawah tanggungjawab undang-undang seperti yang dimandat oleh

undang-undang. Defendan-defendan setelah menunjukkan bahawa mereka mempunyai hak undang-undang untuk membuat aduan, dan lembaga, jelas mempunyai tugas undang-undang untuk menerima aduan-aduan, pembelaan perlindungan bersyarat berhak kepada defendan-defendan (lihat perenggan 23, 24 & 33).

(2) Berdasarkan keterangan, plaintif gagal untuk membuktikan bahawa terdapat niat jahat atas penerbitan surat aduan oleh defendan pertama. Walaupun defendan-defendan telah memplidkan pembelaan perlindungan mutlak, mahkamah mendapati bahawa defendan-defendan berjaya membuktikan pembelaan perlindungan bersyarat mereka, oleh itu adalah cukup untuk mahkamah menjustifikasikan dan menentukan pembelaan di mana defendan telah berjaya membuktikannya. Pembelaan perlindungan bersyarat adalah salah satu pembelaan untuk kes-kes fitnah selain daripada perlindungan mutlak (lihat perenggan 36–37).]

Notes

For cases on defamation, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 209–231.

Cases referred to

Adam v Ward [1917] AC 309, HL (folld)

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315; [1989] 1 CLJ 321 (Rep), HC (refd)

Chok Foo Choo @ Chok Ku Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (refd)

John Lee & Anor v Henry Wong Jan Fook [1981] 1 MLJ 108; [1980] 1 LNS 190, FC (refd)

Jones v Skelton [1963] 3 All ER 952, PC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2009] 5 MLJ 770; [2010] 3 CLJ 310, CA (refd)

S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173; [1988] 1 CLJ Rep 233, SC (refd)

Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56; [1973] 1 LNS 146 (refd)

Legislation referred to

Legal Profession Act 1976 s 99

Bankruptcy Act 1967 s 38(1)(a)

Mohd Nashir Hussin (Sulastri Zainal with him) (Nashir Johal & Co) for the plaintiff.

Siti Badariah Mohd Yusof (Azizah bin Md Arshad and Normastura bt Ayub with her) (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Rosilah Yop JC:

INTRODUCTION

[1] The plaintiff claims against the defendant is for damages for defamation through a letter dated 3 February 2006 signed by the first defendant and addressed to the Advocates & Solicitors Disciplinary Board, Kuala Lumpur (Board). The particulars of the plaintiff's claim are for:

(a) general damages for libel;

(b) exemplary damages;

(c) interest on damages;

(d) costs.

THE PLAINTIFF'S CASE

[2] The plaintiff is an advocate and solicitor of the High Court of Malaya.

[3] At the material time, the first defendant was the director general of insolvency, attached to the Insolvency Department Malaysia.

[4] The second defendant was a senior federal counsel at the same department.

[5] By a letter dated 3 February 2006 (the complaint letter), the first defendant falsely and maliciously wrote and published to the Advocates & Solicitors Disciplinary Board the words which are defamatory of the plaintiff. The said complaint letter was pleaded in para 5 of the statement of claim.

[6] The second defendant furnished to the first defendant the material allegations made against the plaintiff in the said letter dated 3 February 2006. The material allegations made against the plaintiff in the said complaint letter addressed to the Advocates & Solicitors Disciplinary Board are false. In publishing, the said complaint letter the defendants was actuated by express malice.

[7] By reason of the publication of the said words, the plaintiff has been

seriously injured in his reputation and has suffered distress and embarrassment.

THE DEFENDANT'S CASE

[8] The defendants in their defence contended that the content of the said letter was published in a state of qualified privilege and there was no malice on the defendants in publishing the said complaint letter. Further the defendants pleaded the defence of absolute privilege.

FINDINGS OF THE COURT

The law

[9] It is trite law that in an action for libel, the burden of proof lies on the plaintiff to prove:

(a) the words are defamatory;

(b) the words refer to the plaintiff; and

(c) the words were published (to the third party).

(See the case of *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 at p 316).

Whether the words are defamatory

[10] The whole letter dated 3 February 2006 was pleaded as the words that defamed the plaintiff. In their natural and ordinary meaning words pleaded (letter dated 3 February 2006) meant and were understood to mean that:

(a) the plaintiff is a liar;

(b) the plaintiff is a dishonest person;

(c) the plaintiff is an untrustworthy person; and

(d) the plaintiff intentionally deceived the Court of Appeal and hence is unfit to practice as an advocate and solicitor.

[11] As to whether the words complained of in this case were capable of being, and were, in fact, defamatory of the plaintiff, the test to be considered is whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally. Mohammed Azmi J (as he then was) in *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56; [1973] 1 LNS 146.

[12] In the case of *Chok Foo Choo @ Chok Ku Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 461, the Court of Appeal said at p 375 (MLJ); p 467 (CLJ):

> … the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

[13] To prove defamation in this case, the plaintiff relies on the natural and ordinary meaning the words pleaded in paras 4–5 (letter dated 3 February 2006) of the statement of claim.

[14] The law is well established that in order to determine whether the defendants' words in the said letter is libelous or not, it should be understood to mean in their natural and ordinary meaning — see *Jones v Skelton* [1963] 3 All ER 952.

[15] In my judgment, the test to be applied lies in the question whether the words in their natural and ordinary meaning impute to the plaintiff any dishonorable or discreditable conduct or motives or a lack of integrity on his part. If the question invites an affirmative response, then the words complained of are defamatory.

[16] Looking at the words used in the said complaint letter read as a whole, the sting of the words lies in the allegation that the plaintiff is a liar, dishonest and untrustworthy person and the plaintiff intentionally deceive the Court of Appeal and hence is unfit to practice as an advocate and solicitor which certainly has a tendency to cast an adverse opinion of the plaintiff and to lower the estimation of the plaintiff in the eyes of the public and society. I therefore found the content of the said letter read as a whole is defamatory to the plaintiff.

Whether the words refer to the plaintiff

[17] The other elements of defamation would be to establish whether the words make reference to the plaintiff. The content of the said letter clearly stated the plaintiff's name.

[18] In my view it patently refers to the plaintiff.

Whether the words were published

[19] In *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173; [1988] 1 CLJ Rep 233, the Supreme Court held that:

> In order to constitute publication, the defamatory matter must be published to a third party, and not simply to the plaintiff. By publication is meant the making known of the defamatory matter, after it has been written, to some person other than the person of whom it is written. The uttering of a libel to the party libeled is no publication for the purposes of a civil action. *Wenhak v Morgan* (1880) 20 QBO at p 637. A plaintiff will not, as a rule, be permitted to wait until after discovery before naming the persons to whom a libel was published: *Barham v Lord Huntingfield* [1913] 2 KB 193 (CA).

[20] The defendants in their defence admitted that the said letter was written and published by the first defendant to the Advocates & Solicitors Disciplinary Board.

[21] By such admission, I conclude that the said letter which contains the defamatory words of the plaintiff was published to a third party.

Whether the defence of qualified privilege applies in the circumstances of this case

[22] The locus classicus of this defence is the case of *Adam v Ward* [1917] AC 309:

> A privilege occasion is an occasion where the person who makes the communication has an interest, or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential.

[23] In principle therefore the defence of qualified privilege is only available where there is actual reciprocity of interest between the speaker and the recipient.

[24] The Federal Court case of *John Lee & Anor v Henry Wong Jan Fook* [1981] 1 MLJ 108; [1980] 1 LNS 190 is a clear authority on this point. In that case, the Federal Court held that the defence of qualified privilege applied in a case where the recipient of the alleged defamatory statement was a trade union known as SCEU. SCEU had a written agreement with commercial employers in Sarawak on behalf of their employees. The employers of the respondents were under a duty to make the charge to the recipient SCEU as a party who had

a right or interest to receive it. The Federal Court also cited *Adam v Ward* and applied the same principle on this issue. The defence of qualified privilege was held applicable.

[25] Based on the principles of law, the content of the said letter was made in the state of qualified privilege. According to the first defendant ('SD2') evidence, she did investigate what happened during the appellate court proceeding on the 16 January 2006 that resulted the comments made by the Court of Appeal judge and was published in several newspapers. Later, a letter dated 3 February 2006 was written to the board by the first defendant for the content of the said letter to be investigated.

[26] The defendant had submitted that all the allegations in the complaint letter were false. But SD2 in her testimony testified that at the material time she believed that she had the basis for a complaint against the plaintiff to the board after she had investigated and verified about what had happened in the Court of Appeal on 16 January 2006. This evidence was not challenged.

[27] At that material time the first defendant was the Director General of Insolvency, Insolvency Department of Malaysia. She had a duty to preserve the reputation and good name of her department. SD2 had written and submitted a letter of complaint to the board about the plaintiff's conduct in respect of his profession as a lawyer. The plaintiff conduct complained of was referring to the statement made by the plaintiffs to the Appeal Court judges during the proceedings at the Court of Appeal, which was attended by the second defendant.

[28] The said complaint letter was submitted to the Advocates & Solicitors Disciplinary Board as the only board which has an interest and responsibility to receive, investigate and determine any complaints against lawyers, including plaintiff. The interests and responsibilities of the board provided for under s 99 of the Legal Profession Act 1976.

[29] The Advocates & Solicitors Disciplinary Board is the body entrusted with the responsibility of maintaining standards of professionalism amongst advocates and solicitors. They are tasked with the responsibility of maintaining good corporate governance and professional standards amongst their member's. Towards this end, a complaint mechanism has been established in the rules. The rules provide for procedures to be used and the defendants have followed the steps stipulated in the rules.

[30] Anyone with complaints against an advocate and solicitor is duty bound to lodge such complaint for the board to investigate the complaint under the

Legal Profession Act 1976. Such investigation will give the public the confidence to deal with persons in that profession.

[31] As such, complaints against professional conduct can be an important source of information for the Board when assessing and determining whether or not the plaintiff deserves to be taken any action under the Legal Profession Act 1976. That is the whole purpose of this complaint mechanism. For this mechanism to work, the defendants who were affected must be allowed to lodge any complaint in the manner provided by the law. If not legal, the defendants certainly had a moral and social duty to lodge the complaints that they did.

[32] The board has also been given by the law the method of resolving the complaints and to take the appropriate steps to achieve the intended objective of maintaining a good code of ethics amongst advocates and solicitors.

[33] On the point of reciprocity required on the part of the receiver of the complaints, the board is not only a body with a corresponding interest as in the case of *John Lee & Anor v Henry Wong Jan Fook* but it is also under a legal obligation as mandated by the law. The defendants having shown that they have legal rights to complain, and the board, quite clearly having a legal duty to receive the complaints, I am of the view that the defence of qualified privilege is available to the defendants.

ABSENCE OF MALICE

[34] The burden of proving the existence of malice is on the plaintiff as was held in the case *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315; [1989] 1 CLJ 321 (Rep); [1989] 1 CLJ 152 (HC), His Lordship Mohamed Dzaiddin J (now CJ) has clearly said:

> Where a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privileged. (*Rajagopal v Rajam* [1972] 1 MLJ 45; [1971] 1 LNS 117.)

[35] The plaintiff submitted that the second defendant entered into her diary false facts and the first defendant knowing that it was false facts use those false facts as the basis of making complaint to the Advocates & Solicitors Disciplinary Board. These facts were rebutted by the first defendant as follows:

(a) from the testimony of SD2, there was no bad faith on the part of the defendants in writing and publishing the said letter of complaint. In her testimony she stated that at the material time SD2 believed that she had the basis for a complaint against the plaintiff to the board after she had investigated and verified about what had happened in the Court of Appeal on 16 January 2006. Her belief was not only based on the information from SD1 but was also based on her investigation and verification from the office records, appellate court records and from the newspaper reports;

(b) the department records showed that the plaintiff's firm or the bankrupt never apply for the sanction under s 38(1)(a) of the Bankruptcy Act 1967. The appellate courts records (attendance list) showed that the plaintiff represented the appellant. The notice of appeal was filed by the plaintiff's firm; and

(c) there was a note in the minutes of proceeding of the court stated 'Perayu telah muflis sejak 2003 tetapi masih tiada sanksi'.

[36] Based on the evidence the plaintiff failed to prove that there is malice on the publication of the said complaint letter by the first defendant.

[37] Although the defendants had pleaded the defence of absolute privilege, the court found that the defendants had successful proved their defence of qualified privilege, thus I found it is sufficient for the court to justify and determine a defence where the defendant had successfully prove it. Defence of qualified privilege is one of the defences for defamation cases other than absolute privilege.

ISSUES NOT PLEADED

[38] The plaintiff submitted on the issue of groundless disciplinary proceedings at the Advocates & Solicitors Disciplinary Board. This issue was not pleaded by the plaintiff. The court is of the view that the plaintiff could not raise issues not pleaded in his statement of claim. He is therefore bound by his own pleadings.

[39] In the absence of pleadings, no party should be permitted to travel beyond its pleadings. As such I did not take into consideration on this issue in deciding this action.

[40] In the Court of Appeal case, *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2009] 5 MLJ 770; [2010] 3 CLJ 310; [2009] 1 LNS 695 it was decided that: A

> Of course, of utmost importance is the principle that the parties are bound by their pleadings. What this means is this. That the court is not entitled to decide a suit on a matter which is not pleaded and that the trial of the suit is solely confined to the pleadings (*Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330). B
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> Generally, pleadings operate to define and delimit with absolute clarity and precision the real matters in controversy between the parties. This would enable the parties to prepare their respective cases and the court too will be able to adjudicate the case with ease (*S Manickam & Ors v Ismail bin Mohamad & Ors* [1997] 2 MLJ 90; [1996] 1 LNS 117; *Narayanan Ponnusamy v Kannamah Ponnusamy* [1993] 3 MLJ 730; [1993] 4 CLJ 389; and *Anjalai Ammal & Anor v Abdul Kareem* [1968] 2 MLJ 92; [1968] 1 LNS 8). C
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> The right to be informed of any adverse point so that the other side has the opportunity of rebutting it gives rise to the fundamental rule of natural justice (*Muniandy & Anor v Muhammad Abdul Kader Muhd Saheed & Ors* [1986] 1 MLJ 341; [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116; *Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan* [1987] 1 MLJ 393; [1986] 1 LNS 46; *Gimstem Corp (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102; and *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633; [1993] 4 CLJ 476). According to the case of *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157; [1974] 1 LNS 178 as well as the case of *Ria Enterprise & Ors v MBf Finance Bhd* [2000] MLJU 744; [2001] 1 CLJ 687, any judgment decided on an issue that was not raised in the pleadings, that judgment can be set aside and a new trial ordered. D E F
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> … In the absence of pleadings, evidence if any produced by the parties cannot be considered by the court and no party should be permitted to travel beyond its pleadings. All the necessary and material facts should be pleaded by the party in support of the case set up by the said party (*Ram Sarup Gupta (dead) by L Rs v Bishun Narain Inter College and others* AIR 1987 SC 1242; and *K Kanakarathnam v A Perumal and another* AIR 1994 Mad 247). According to the case of *Hah Chand v Daulat Ram* AIR 1987 SC 94, no evidence can be led on a fact not pleaded. Neither is it open to the parties to give up its case set out in the pleadings and propounds an entirely new and different case (*Vinod Kumar Arora v Smt Surjit Kaur,* 1987 AIR SC 2179 at 2183). G H I

A CONCLUSION

[41] Based on the whole evidence adduced, I find that the plaintiff failed to prove its claims against the defendants. Thus the plaintiff's claim is dismissed with costs by the court. Costs RM20,000 to the defendants.

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Claim dismissed with costs of RM20,000.

Reported by Afiq Mohamad Noor

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